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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

M.P.,

Appellant,

v.

M.P.,

Respondent.

D073625

(Super. Ct. No. D527064)

APPEAL from an order of the Superior Court of San Diego County,

David B. Oberholtzer, Judge. Affirmed.

Higgs Fletcher & Mack, John Morris and Rachel E. Moffitt for Appellant.

M.P., in pro. per. for Respondent.

Mother appeals from the restraining order issued by the trial court to protect her ex-husband (Father). The court found that Mother abused Father by disturbing his peace in two ways: (1) by soliciting their children to surveil him, and (2) by making unwanted appearances at his house. The order cascades from a long history of conflict between the

parties, from separation (2009) and divorce (2010) through several repeated attempts and failures to agree to workable custody, visitation, and support orders. On this appeal, Mother argues that the trial court abused its discretion by relying on evidence of abuse insufficient as a matter of law to support issuance of a restraining order under the Domestic Violence Protection Act (DVPA) (Fam. Code, § 6200 et seq.). She also raises several evidentiary issues, including whether the court properly admitted evidence primarily bearing on a separate custody and visitation dispute. In response, Father maintains that the trial court properly exercised its discretion in receiving relevant evidence and issuing the order.

We conclude that substantial evidence relating to unwanted visits and surveillance supports the court's finding of abuse. We likewise reject Mother's additional evidentiary arguments. This is a close case, not because the law is unclear or the facts uncommon, but because it is difficult to disentangle allegations of emotional abuse by one parent against another from knotty disputes over custody and visitation, particularly where, as here, the custody issue is the crux of the dispute. On these facts, it might have been preferable for the trial court to consider those issues altogether or, at a minimum, for the same judge who managed the primary custody dispute to oversee the restraining order hearing. But we do not now second guess those decisions. Instead, we confront an appeal limited to narrow questions of admissibility and sufficiency of the evidence in support of the restraining order issued against Mother. Mindful of the great deference to be afforded to the trial court through our standard of review, we find substantial evidence supports the court's finding that Mother's actions were sufficiently abusive that they

disturbed Father's peace by destroying his mental or emotional calm. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Background*

Mother and Father married in 1995 and had two children together: Thomas (Tom), now 17, and Jack, 13. The parents separated in 2009 and divorced the following year. Since then, their relationship has grown increasingly strained as they have struggled to find a suitable arrangement for meeting their parenting responsibilities. They have tried coparenting, parallel parenting, working with minors' counsel, and attending high-conflict parenting classes. Nothing has proved workable, and the parties have responded to the situation by making frequent requests to modify the existing custody, visitation, and support orders.

B. *The Parties' Dueling DVTRO Requests*

In August 2017, the family law judge assigned to the parties' case (Judge David M. Rubin) entered an order modifying the existing custody and visitation regarding the parties' two sons. Ten days later, Father filed a Request for a Domestic Violence Temporary Restraining Order (DVTRO) and a Request for Child Custody and Visitation Orders, lodging several exhibits in support. A different judge denied the request for temporary relief, explaining that it raised a "custody and visitation issue, not [a] DVPA" issue, but scheduled a hearing on September 20 for the restraining order request. When Father filed a subsequent ex parte application for a DVTRO—effectively on the same grounds as his August 28 request—yet another judge denied it, noting that the September

20, 2017 "date is confirmed with Judge Rubin for the parties to present their respective requests at that time." The September 20 hearing was continued to September 26 by agreement of the parties. After the hearing, Judge Rubin denied Father's request for temporary relief but entered several interim orders and set the restraining order request for a hearing on October 20 and the custody and visitation matter for a hearing on December 1.

Citing Father's repeated restraining order requests, as well as allegations of harassing phone calls, text messages, e-mails, and threatening visits, Mother filed her own request for a DVTRO (Domestic Violence Temporary Restraining Order) on September 28, 2017. A fourth judge granted the request for temporary relief and set the matter of whether to issue a restraining order alongside Father's request to be heard October 20. Father filed a response and lodged a series of exhibits in support. The following day, Father sought ex parte relief seeking another DVTRO, as well as to vacate Mother's DVTRO and modify custody orders, all of which Judge Rubin denied. Prior to the October 20 hearing, Father filed a supplemental brief in support of his request for a restraining order and lodged another document exhibit. The October 20 hearing was later continued to November 3, and then again to November 14.

C. *November 2017 Restraining Order Hearing*

On November 14, the restraining order requests were assigned to Judge David B. Oberholtzer for hearing. Judge Oberholtzer heard testimony from both parties. Father argued he was entitled to a restraining order because Mother had disturbed his peace by soliciting their children to spy on him. He also based the request on Mother's uninvited

and unwanted visits to his house. On the surveillance issue, he claimed "[t]he most insidious surveillance . . . is really enlisting the children to spy on their father and report back. . . . She's asked Jack to take pictures and text them to her" if he were to see his father consuming alcohol. Father introduced documents to support his claims, including several images of text messages between his kids and their mother, many of which had been intended for the custody and visitation hearing but were expressly discussed in the supplemental briefing for the restraining order request filed October 20. Over Mother's objection, the trial court admitted all but one of these exhibits.¹

The trial court granted Father's request for a restraining order for a five-year term and denied Mother's request. It found that she was "plainly eliciting the children to spy on him" and that she had also engineered reasons to make knowingly-unwanted appearances at his house. The trial court noted that it did not find her testimony credible and did not "include her text messages to him . . . as part of the reason for" issuing the order.

DISCUSSION

A. *The Trial Court Did Not Abuse its Discretion in Admitting and Relying On the Exhibits Received into Evidence.*

Mother raises two evidentiary claims on appeal. First, she claims that the trial court abused its discretion in admitting all proposed exhibits. That is, "in blindly and capriciously accepting *all* [Father's] exhibits, the trial court failed to exercise any

¹ Specifically, the court admitted exhibits A–B, 1–43, and 45.

discretion at all, which is itself an abuse of discretion." Second, Mother challenges the relevance and undue prejudice of the exhibits relied on as evidence.

Mother's first argument is both factually mistaken and logically unpersuasive. The trial court does not necessarily abuse its discretion by admitting (or rejecting) all proposed exhibits. Were it to have accepted (or rejected) all forty-seven exhibits, we would analyze each admission no differently than if the court had accepted any other portion of them. Furthermore, the court did not accept all exhibits into evidence; it accepted all but one.

Mother's second argument, however, cuts to the core of the most challenging question on appeal—at what point do issues of custody and visitation bleed into questions of abuse by one parent against another? Under other circumstances, it might be possible to more cleanly separate exhibits relevant to a custody dispute from those relevant to an abuse issue. But in situations like this one, where the allegations are of emotional abuse and expressly involve the children, much of the evidence of the parties' interactions becomes relevant to analysis of whether one parent's behavior amounts to a destruction of the other's calm. Relevance is, after all, a modest threshold that merely requires any tendency in reason to prove or disprove any disputed fact of consequence. (See Cal. Evid. Code § 210.)

Accordingly, although it appears that many of Father's exhibits may have been *more* relevant to the custody and visitation dispute, we agree with the trial court that all of the challenged exhibits were relevant to the issues presented at the restraining order

hearing.² To take one example, Father's exhibits regarding Mother's intrusive emails to school authorities might bear more heavily on issues of custody and visitation and are hardly dispositive of abuse, but they tend to show that Mother's willingness to inflict emotional harm and disturb Father's peace was considerable and extended to situations outside the immediate family. The same general principle applies to each of the other challenged exhibits.³

B. *The Evidence of Abuse Is Not Insufficient As a Matter of Law.*

Under the DVPA, the standard for finding abuse through actions "disturbing the peace" is that the alleged conduct "destroys the mental or emotional calm of the other party." (*In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1495 (*Nadkarni*); see *Burquet v. Brumbaugh* (2014) 223 Cal.App.4th 1140, 1146 (*Burquet*) [same].) On appeal, we review the trial court's decision for abuse of discretion. (*Nadkarni*, at p.1495; see also *Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 420.) "The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for

² Although Mother's evidentiary challenge is primarily one of relevance, she has likewise failed to show that any exhibit is unduly prejudicial pursuant to Evidence Code section 352. To the extent duplicate or duplicative exhibits were admitted, any error was harmless. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.)

³ To the extent Mother challenges notice of the exhibits, Father's October 20 supplemental memorandum of points and authorities, filed more than three weeks before the hearing on November 14, outlined the exhibits to be introduced, and he had filed notices of intent to lodge all of the exhibits prior to October 20. Mother has thus failed to show any failure of notice with respect to the evidence admitted at the hearing.

substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711–712, fns. omitted.) We assess whether sufficient evidence supports the trial court's finding that Mother's actions disturbed the peace under the DVPA.

Mother argues that the facts here fall comfortably outside the scope of conduct that would reasonably tend to destroy the other party's mental or emotional calm, citing five recent cases in support: *Nadkarni, Burquet, Rodriguez v. Menjivar* (2015) 243 Cal.App.4th 816 (*Menjivar*), *Altafulla v. Ervin* (2015) 238 Cal.App.4th 571 (*Altafulla*), and *Hogue v. Hogue* (2017) 16 Cal.App.5th 833 (*Hogue*). In response, Father reiterates that substantial evidence supports the court's findings and emphasizes that the trial court discounted the credibility of Mother's testimony.

The trial court appropriately recognized that claims of abuse via surveillance or unwanted and harassing visits to a victim's residence may be cognizable under California law. (See, e.g., *Nadkarni, supra*, 173 Cal.App.4th at p. 1498 [temporary relief]; *Burquet, supra*, 223 Cal.App.4th at pp. 1146–1147 [extending *Nadkarni* to restraining orders].) Conduct may rise to the level of abuse by disturbing the peace of another party such that their mental or emotional calm is destroyed. (*Ibid.*)

In *Nadkarni*, the plaintiff requested a restraining order based on allegations that her ex-husband was disturbing her peace via surveillance by hacking and distributing her e-mails. (173 Cal.App.4th at p. 1489.) The court found that allegations of accessing, reading, and publicly disclosing the content of the plaintiff's confidential e-mails, which

caused her to suffer " 'shock' " and " 'embarrassment,' " to fear the destruction of her " 'business relationships,' " and to fear for her safety, amounted to abuse under the DVPA and required a hearing on the merits. (*Id.* at pp. 1498–1499.) In *Altafulla*, another case regarding surveillance, the court found "ampl[e]" evidence to affirm the issuance of a restraining order. (238 Cal.App.4th at pp. 578–580.) There, plaintiff's ex-boyfriend e-mailed a surveillance-style report about her affair (with images of her and the individual with whom she had an affair) to her friends, relatives, and coworkers, which "did cause and no doubt was calculated to cause, [plaintiff] grave emotional distress." (*Id.* at pp. 579–580.)

Similarly, the court in *Menjivar* found that surveillance-related activity and unwanted contact amounted to abuse, reversing and directing the court to issue a restraining order on remand. (243 Cal.App.4th at p. 824). There, the party to be restrained "exhibited controlling behavior, calling multiple times a day, accusing [plaintiff] of cheating . . . enroll[ing] in three of her four college classes," and forcing her to keep a telephone call open during the fourth class at all times, to monitor her. (*Id.* at pp. 818–819.) He also threatened her over social media and enlisted his friends to send additional threats. (*Ibid.*) The trial court had flatly rejected the notion that controlling behavior could be grounds for a restraining order under any circumstances, but the Court of Appeal disagreed, squarely holding that controlling behavior may disturb the peace of another party under the DVPA. (*Id.* at p. 821.)

In another recent case that presented a closer question, the court considered whether a series of harassing phone calls and text messages disturbed another party's

peace and reversed the trial court's denial of the request to renew a restraining order with directions to grant the renewal. (*Perez v. Torres-Hernandez* (2016) 1 Cal.App.5th 389, 395–398.) The court found that plaintiff had properly established abuse by introducing evidence of continued harassing phone calls and texts, which contained threatening, vulgar language and were prohibited under the terms of the restraining order already in place. (*Ibid.*) The respondent had sent messages asserting that plaintiff was a " 'crazymom' " for putting the kids through the "' trouble' " of reporting him for child abuse; she was " 'going to pay for it' "; and that the kids would " 'pay the consequences.' " (*Id.* at pp. 398–399.) While the trial court found these messages " 'annoying,' " it concluded they did not " 'rise to the level of a pattern of harassment.' " The appellate court firmly rejected that assessment and found that the trial court erred. (*Ibid.*; see also *Sabato v. Brooks* (2015) 242 Cal.App.4th 715, 725 [sufficient that frequent unnecessary contacts are unwanted even in absence of threats of violence against the plaintiff].)

1. *Evidence of Surveillance*

In August 2017, Father and his two sons vacationed in Mexico, spending their first time all together in more than a year. Mother had ongoing concerns with Father's consumption of alcohol, and both parties were ordered not to consume alcohol during, and twelve hours prior to, visitation with Jack. Before the trip, she asked the boys to send her information and photos if they saw their father consuming alcohol, and she sent text messages during the vacation referencing these discussions. For example, in the text message exchange most heavily relied on for evidence of surveillance, Thomas and Mother discuss Father's behavior during the vacation:

"Thomas: Yeah
Mother: Sounds like it has been a good trip so far. No issues with your dad . . .
Thomas: None
Mother: Good.
Mother: Any issues with drinking?
Thomas: Nope
Mother: Good to hear:-)
Thomas: Yeah
Mother: Your "blackmail plan" foiled . . . lol
Thomas: I [know]"

Father testified that his "understanding is that she asked Thomas to report back information; and if Thomas saw me drinking, he would be able to leverage it for something." According to him, this incident made him "feel like I'm under constant surveillance and that the children are weaponized, and that they are spying on me; Tom in particular. [¶] Jack is being recruited to the fight, but it's very unsettling to reestablish my relationship with my son when there is this ulterior motive and I'm under constant scrutiny." He also testified that Jack pressured him to allow Jack to drink alcohol, which he believed was part of Mother's scheme to obtain grounds for blackmail.

2. *Evidence of Mother's Visits to Father's Residence*

a. *The Sheriff Incident*

The day after returning from their vacation to Mexico in August 2017, Thomas begged his father for permission to spend time with his friends. His father would not budge and expressly forbade Thomas to see his friends that day. Thomas went anyway, and Father called the sheriff to report he had run away from home.

The following Monday, Mother called the sheriff to report Father for stealing Thomas's clothing and sports equipment, which had gone missing. Father testified that

after Mother called the sheriff, she and her mother came to his house to watch him get arrested. Shortly thereafter, the allegedly stolen property was found in a seabag in Father's garage and no further law enforcement action was taken.

Apart from relying on this incident to show Mother engineered a knowingly-unwanted appearance at his house, Father further argues this incident shows that she engaged in surveillance by asking her son Jack to send her communications he had had with his father before and during the incident. According to Father, she improperly involved their children by coercing them into supporting her allegations that he stole his son's property. He supports his claim with a series of text messages between her and Jack:

"[3:00 p.m.]

Mother: Jack, please send me a screen shot of your calls and text messages to dad this morning.

Jack: It dose [*sic*] show when I called someone just when they called me

Mother: Yes it does. Adjust your settings.

Mother: To show recent

Jack: No im [*sic*] too lazy and you guys over reacted

Mother: That is disappointing. Shows your lack of character.

Jack: I don't care mom it's over with ok

Mother: You know how stressed your brother was this morning and your dad is lying to me and your brother.

Mother: you should care about your dad lying."

"[3:09 p.m.]

Mother: Jack, Hope you all set for school tomorrow with new school clothes and school supplies. Have a great first day of 7th grade! Love you. Mom

Jack: Ok thanks

Mother: :-)"

b. *The Shower Incident*

In April 2017, Mother made an unannounced appearance nearby Father's house (inside the gates of his development by his house, but not on his property) around 10:30 p.m. and for at least a brief time, refused to leave when Father asked her to do so via text message.⁴ Earlier that day, Jack walked in on Father in the shower with a woman and—according to Mother—sent his older brother Thomas (who was at Mother's house) a message expressing concern about it. Mother found out, texted Father about it, and then drove to his development unannounced. It is unclear how long Mother was in the development, but evidence suggests she was only there for a brief period of time. She did not go to the door or otherwise confront Father.

c. *The Basketball Jersey Incident*

In August 2017, Mother sent Jack (who was with Father at his house) a text message to ask if she should come pick up his basketball jersey for an important game the following school day. Jack said yes, and she went over to pick up the jersey. The

4 "[9:33 p.m.]
"Mother: [M.], Jack just texted Tom that you are in the shower with a woman named Robin and it is not okay with Jack."

"[10:22 p.m.]
Father: [M.], he's not in danger. You need to support my visitation and let me work this issue with Jack by leaving. Staying, with Tom here witnessing this, is undermining my visitation.

Mother: We are not at your house.

Father: You need to leave.

Father: I do not consent to your being here or to picking Jack up to cut my visitation off

Mother: Again, I am not at your house."

evidence at trial did not explain why it was necessary for Mother to be involved in the logistics of transporting the jersey.

3. *Analysis*

The record in this case reveals a mother and father with serious difficulties. They are unable to work together as parents, and their failure to do so is adversely affecting their children. One of the several judges who handled the matter in the trial court suggested that this case largely presents a "custody and visitation issue, not [a] DVPA" issue. And while that may be one reasonable perspective, our role is limited to determining whether no reasonable judge could have concluded that the evidence here supported a finding of abuse under the DVPA.

On the specific question of the sufficiency of the evidence, the facts here present us with a close call. Mother asked her sons to send information and photos to her if they saw Father consuming alcohol, something he was not supposed to do while supervising the boys. She also asked Jack to send her communications he had with his father during an incident where Mother called the sheriff to investigate some missing clothing. Finally, she made three unwanted visits to Father's house or his gated development (the sheriff, shower, and basketball jersey incidents). The question is whether these actions—singly or taken together—are sufficiently serious that they reasonably destroyed Father's mental and emotional tranquility.

None of Mother's actions is independently dispositive. Although Father emphasizes the surveillance-related evidence, those discussions concerned issues closely linked to the children's wellbeing—e.g., alcohol consumption by a caretaker. Father had

been ordered not to consume alcohol during visits, and Mother had ongoing concerns as she sent her children to vacation with him. At the same time, they show Mother's intrusion, in a carefully premeditated manner, into Father's parenting experience at a critical time for his relationship with the two boys. Similarly, while some of the evidence of unwanted visits contains the germ of an arguably legitimate purpose, considered together it shows Mother's consistent willingness to poke and prod, instigate and exacerbate, all of which appears intended to destroy Father's emotional wellbeing.

The evidence thus supports a finding of hostile encroachment by Mother into Father's emotional wellbeing. Given the extent of coparenting responsibilities, there was inevitably significant contact and significant opportunity for Mother to disturb Father's peace. Although reasonable judges might reach different conclusions, on these facts we conclude sufficient evidence supports the court's finding of abuse under the DVPA.⁵

⁵ While the court issued the restraining order for the maximum five-year period, Mother does not separately challenge the length as an abuse of discretion. We further note that the restraining order is always subject to modification or termination by further order of the court on the motion of a party pursuant to Family Code section 6345.

DISPOSITION

The order is affirmed. Father is entitled to costs on appeal.

DATO, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.